80-121

No.

Supreme Court, U. S.
FILED
JUL 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO,

Petitioner

v.

MIDWEST STOCK EXCHANGE, INCORPORATED; MIDWEST CLEARING CORPORATION; MIDWEST SECURITIES TRUST COMPANY; and MIDWEST STOCK EXCHANGE SERVICE CORPORATION,

Respondents

and

NATIONAL LABOR RELATIONS BOARD,

Party in Interest

APPENDIX

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-1501

MIDWEST STOCK EXCHANGE, INCORPORATED; MIDWEST CLEARING CORPORATION; MIDWEST SECURITIES TRUST COMPANY; and MIDWEST STOCK EXCHANGE SERVICE CORPORATION,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Review of an Order of the National Labor Relations Board

ARGUED JANUARY 10, 1980—DECIDED MAY 2, 1980

Before PELL, *Circuit Judge,* PECK, *Senior Circuit Judge,** and WOOD, *Circuit Judge.*

PECK, *Senior Circuit Judge.* This case is before the Court on a petition by Midwest Stock Exchange, Inc., Midwest Clearing Corporation, Midwest Securities Trust Company, and Midwest Stock Exchange Service Corporation (the Exchange) to review, and a cross-application of the National Labor Relations Board (the Board) to enforce an order issued by the Board against the petitioners. The order directs the Exchange to bargain collectively with Local 28 of the Office and Professional Employees International Union (the Union). It rests on the Board's decision that the Exchange's refusal to bargain with the Union constituted an unfair labor practice in violation of section 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5).

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* Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

The Board's order is entitled to enforcement unless the Union was improperly certified by the Board as the collective bargaining representative of the Exchange's employees. *Celanese Corp. of America v. N.L.R.B.*, 291 F.2d 224 (7th Cir. 1961), *Monmouth Medical Center v. N.L.R.B.*, 604 F.2d 820 (3rd Cir. 1979). We hold that the Board's certification of the Union in this case is inconsistent with its declared policy as established by its previous decisions, and we deny enforcement.

On September 12, 1977, the Union filed a representation petition with the Board seeking certification as the bargaining representative of all full and part-time office and clerical workers of the Exchange. An election was held on January 25, 1978, and the Union won the election by a vote of 182 to 149; 28 challenged ballots were resolved by stipulation of the parties.

The Exchange timely filed objections to conduct affecting the results of the election, alleging among other things, that (1) the Union interfered with the election through the electioneering activity of its authorized "election observer," Jonathan James, at and away from the polling area, and (2) the Board's failure to control James's activities in the polling area constituted misconduct warranting a new election. Subsequently, a hearing was held to resolve these two issues.

The hearing officer made findings of fact based on the testimony of several witnesses, including Exchange observer Sonja Griffin, Board agents assigned to the election, employees who voted in the election, and Jonathan James, the Union observer. With few exceptions, petitioners do not here dispute the factual findings of the hearing officer; what they do contest are the conclusions drawn from the facts as established. Because our disposition of this case is based solely on the facts as found, the facts appearing hereinafter are extracted exclusively from the Report of the hearing officer, as adopted by the Board.

I

The hearing officer found that James engaged in conversations with several voters during the course of the election. On one occasion, three voters greeted James, who was seated at the time in the corridor outside the voting room, upon entering the voting area. After a brief exchange, the three men joined the line of employees waiting to vote. When they emerged from the voting room, they dallied in the corridor, and James approached and spoke with them for about one minute before a Board agent interrupted and ended the conversation.

Shortly thereafter, a noisy group of seven or eight employees got in line to vote. James "whispered" to a female in the group. More than a few words were spoken, but the conversation apparently lasted less than a minute. There was no evidence as to the content of the conversation. The voting line consisted of from ten to fifteen voters during both conversations cited above.

In another incident, a young man joined the voting line, greeted James, and then began talking to him about work, though there was no testimony as to any specific comments made. The conversation then turned to "friendly banter." The entire incident lasted from three to five minutes and took place in the presence of fifteen voters. Again the conversation ended when a Board agent intruded and asked James to "cut his conversations short."

The lengthiest conversation occurred early in the voting process. Mrs. Jerri Thomas, accompanied by her four-year-old daughter, was standing in the voting line, which consisted of from five to twenty persons. James was seated in the corridor, opposite the voting line and next to Sonja Griffin, the employer's observer. As the hearing officer found:

> Jerri Thomas, greeted James with "what's happening?" He replied, "Nothing." Thomas thereafter

> asked him what he was doing there, and he explained that he was an observer. He then asked her what she had done the previous night, and inquired why she had her little girl with her. . . . Thomas replied that she would be taking her child home and probably returning to work later. Thomas then asked James whether he would watch the girl while she went in to vote. James said "Yes," and Thomas commented that she would be right back. Griffin estimated that the entire conversation lasted 5 minutes. During this time, Thomas also conversed with other voters, and James was greeted by an unidentified voter.

The babysitting of Thomas' daughter is another incident of which petitioners complain. After James agreed to watch Thomas' daughter, the girl crossed the hallway and sat on James's lap, where she remained until her mother returned from the voting room. The time that elapsed during this incident was estimated by one witness to be four minutes and by another to have been fifteen to twenty minutes, though the hearing officer made no specific finding as to the length of the episode. While on James's lap, the girl chatted with him and the two played with a toy bank containing a few pennies.

The final specific instance of conduct that petitioners allege invalidated the election occurred away from the polling area, but, arguably, on the "line of march" to the polling place. Having earlier asked a Board Agent's permission to leave for lunch, James left the polling area about two hours after the voting had commenced. James traveled by elevator from the 12th floor, where the election was being held, to the lobby and continued to the basement by way of the stairs. James proceeded to a locker room in the basement where he took off his observer's badge and put it in his pocket. The hearing officer found that James engaged in a three-minute conversation with three em-

ployees in the lobby. The content of that conversation was not disclosed.

Board agent Hoffman, one of the agents responsible for the conduct of the election, estimated that he admonished James to refrain from conversing with employees waiting to vote on no less than six occasions, and that, as the hearing examiner found, several other incidents escaped detection.

After applying what she deemed to be the relevant principles of law to the facts as found, the hearing officer recommended that petitioners' objections be overruled on the grounds that the conversations of the Union observer with employees were merely brief, innocuous exchanges and did not involve the appearance of electioneering, and the observer's performance of child care services was only a courtesy performed in response to a request. She further recommended that the Union be certified to represent petitioners' employees. The exchange filed Exceptions to the Hearing Officer's Report, but a three-member panel of the Board unanimously affirmed the Report, without opinion, and certified the Union as the exclusive bargaining representative of the Exchange's clerical and office employees.

The Exchange refused to bargain with the Union, and an unfair labor practice hearing was commenced. The Exchange defended its refusal to bargain on the ground that the Board's certification was invalid and that the Exchange, therefore, was under no legal obligation to bargain with the Union. The Board rejected this argument, granted the Regional Director's Motion for Summary Judgment against the Exchange, and issued the order to bargain which is the subject of the petition presently before this Court.

II

The first question of law to be addressed is the scope of judicial review of Board orders respecting the validity

of representation elections. The Board asserts that the court must limit its inquiry to whether the Board's determination falls within its "wide degree of discretion," and petitioners must show that the Board clearly abused its discretion in overruling petitioner's objections.

This Court has explained clearly the balance between the Board's discretion to establish rules governing election procedures and the Court's obligation to review the Board's application of those rules. In *Celanese Corp. of America v. N.L.R.B.*, 291 F.2d 224, 225 (7th Cir. 1961), this Court held that the Board's "wide discretion" lies in the initial promulgation of rules and regulations establishing the procedures and safeguards for conducting representation elections. *See also N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). We went on to say, however, that the courts of appeals bear the responsibility of reviewing the Board's specific application of its rules. 291 F.2d at 225. "Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board." *Id. See also N.L.R.B. v. Mosey Mfg. Co., Inc.*, 595 F.2d 375, 377 n. 5 (7th Cir. 1979).

The Board is not forever bound by its prior declarations of policy, and is free, for example, to exercise its discretion to alter its rules when, in the wisdom gained through experience, it concludes that its rules have failed to effectively safeguard elections or when it finds a rule to be unduly burdensome. *N.L.R.B. v. Mosey, supra*, 595 F.2d at 375. Where the Board has promulgated standards governing the conduct of an election, however, those standards are controlling until the Board announces a change and its reason for the change. *See Delta Drilling Co. v. N.L.R.B.*, 406 F.2d 109 (5th Cir. 1969). Until such a change is announced, the Board's application of its standards must be reasonably consistent with its previous decisions. *Mon-*

mouth Medical Center v. N.L.R.B., 604 F.2d 820, 823 (3rd Cir. 1979). The duty of this Court then, is to examine the Board's conclusions in the case before us and determine whether the Board has fairly applied its chosen standard. *Hometown Foods, Inc. v. N.L.R.B.*, 416 F.2d 392, 395 (5th Cir. 1969). It follows that whether we are in agreement with such conclusions of the Board is irrelevant.

III

Petitioners argue that the conduct in the instant case violates the rule set forth by the Board in *Milchem, Inc.*, 170 NLRB 362 (1968), and that the Board's decision is either a misapplication of the *Milchem* standard to the undisputed facts, or an impermissible departure from its previously stated policies without notice or explanation. We feel compelled to agree.

We begin our analysis by considering the precursor to *Milchem, supra,* establishing the Board's general policy with regard to protecting the integrity of the election process. In *General Shoe Corporation,* 77 NLRB 124, 127 (1948), the Board established the basic standard for evaluating conduct during elections:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

The Board reaffirmed its commitment to insure the integrity of the election process when, in *Milchem, supra,* it

declared that elections would be overturned where representatives of any party to the election engaged in "prolonged" conversations with voters waiting to cast their ballots, regardless of the content of the remarks exchanged. 170 NLRB at 362. The Board reasoned that the potential for distraction, last minute electioneering, and unfair advantage, justified a "strict rule" against such conduct, without requiring an examination into the substance or effect of the conversations. *Id.* Recognizing the impossible task of eliminating all conversations in the polling area, the Board stated that its rule would not necessarily void elections upon the occurrence of "any chance, isolated, or innocuous comment." *Id.* at 363. Without defining the point at which a "trifling" comment becomes a prolonged conversation, the Board set aside an election where a union representative had engaged in an estimated five minute conversation. Thus, it is clear that a five minute conversation is not *de minimus* and requires a second election. *See Sonoco Products Co. v. N.L.R.B.*, 443 F.2d 1334, 1337 (9th Cir. 1971).

We need look no farther than to the conversation between James and Mrs. Thomas to reach the conclusion that the Board without explanation departed from *Milchem* in the present case. Exchange observer Sonja Griffin estimated, and the Board credited her testimony, that James spoke to Mrs. Thomas for five minutes. Nevertheless, the hearing officer concluded that *Milchem* was not violated because this was not a "prolonged" conversation. The hearing officer sought to further distinguish *Milchem* by stating that the incident did not involve "a one-to-one conversation: other voters took part at will." Finally, the hearing officer declared that the circumstances in the present case did not "even suggest the appearance of electioneering, the basis for the *Milchem* proscription of conversation."

However, given the facts as found by the Board, its conclusions based thereon are irreconcilable with the result in *Milchem*. First, though the Board in *Milchem* did not at-

tempt to designate the transition point between a "trifling" comment and a "prolonged" conversation, it unquestionably concluded that a five minute conversation falls within the latter category. The Board has failed to explain to this Court's satisfaction how a five minute conversation can be prolonged in one instance and not prolonged in another. In the absence of a Board announcement of a change in the *Milchem* standard and its reason for the change (the Board does not contend that it has overruled *Milchem*), it is our judgment that the Board misapplied its established rule.

The Board asserts that it followed the dictates of *Milchem* in approving James's conduct because there was "no appearance of electioneering," the basis for the *Milchem* decision. It argues to this Court that James's remarks were innocuous and there was no potential impact on the voters. The appearance of electioneering, however, was but one of several reasons advanced in *Milchem* for strictly prohibiting conversations of this type. There the Board explained that is was also concerned that voters would be distracted during the final minutes before they cast their vote. These last few moments before voting, the Board reasoned, should be the voter's own, "as free from interference as possible"; a time during which a voter can consult his own conscience without interruption. 170 NLRB at 362-363. It was for this reason, as well as its concern with the appearance of electioneering that might result from prolonged conversations, that prompted the Board to adopt a "blanket prohibition" against such conversations, without inquiry into their "substance or effect." *Id.* Thus, the Board here perverted *Milchem* insofar as its decision was predicated in anywise upon a consideration of the content of James's conversation or the appearance of his conduct.

The cases relied upon by the Board, *see, e.g., N.L.R.B. v. Bostik Division USM Corp.*, 517 F.2d 971 (6th Cir. 1975), are not to the contrary. They simply make explicit what was implicit in *Milchem*. That is, where conversations are

of a much shorter duration than the one condemned in *Milchem, Milchem's* per se rule is not applicable, and it becomes necessary to make a case-by-case inquiry into the nature and effect of the conversations, which inquiry must be tempered by a sense of realism. *See also Century City Hospital,* 219 NLRB 52 (1975); *Helca Mining Co.,* 218 NLRB 61 (1975). *Compare Pastoor Bros. Co.,* 223 NLRB 451 (1976), and *Volt Technical Corp.,* 176 NLRB 832 (1969).

The purported distinctions between *Milchem* and the present case advanced by the Board to justify the result here vanish upon close examination of the facts which existed in *Milchem.* Here, the Board found that James and Thomas were intermittently joined in their conversation by other voters; thus, theirs was not a "one-to-one" conversation. Similarly, the evidence in *Milchem* was that the union representative spoke to "several" employees waiting to vote, not just one. Moreover, the offender in *Milchem* was, as in the case at bar, removed a "few feet" from his intended audience. Even were the distinctions drawn in this case real rather than imaginary, they could hardly suffice to avoid the consequences of *Milchem* without eviscerating the rule there set forth.

We stress that we do not here pass upon the wisdom of the *Milchem* rule; our function is merely to test the fairness of the Board's application of its own standard in the case before us. For the reasons stated above, we hold that the Board's application of its rule was not reasonably consistent with *Milchem* or with its subsequent decisions. Therefore, the Exchange's petition for review is granted, the Board's application for enforcement is denied, and the Board's certification of the Union is vacated.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

241 NLRB No. 158

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 13-CA-18121

MIDWEST STOCK EXCHANGE, INCORPORATED,
MIDWEST CLEARING CORPORATION,
MIDWEST SECURITIES TRUST CO., and
MIDWEST STOCK EXCHANGE SERVICE CORPORATION

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
LOCAL 28, AFL-CIO

DECISION AND ORDER

Upon a charge filed on October 16, 1978, by Office and Professional Employees International Union, AFL-CIO, herein called the Union, and duly served on Midwest Stock Exchange, Incorporated, Midwest Clearing Corporation, Midwest Securities Trust Co., and Midwest Stock Exchange Service Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint and notice of hearing on November 22, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

The complaint alleges in substance that on September 29, 1978, following a Board election in Case 13-RC-14526 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit

found appropriate;[1] and that, commencing on or about November 10, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 4, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 28, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 18, 1979, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice to Show Cause.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

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[1] Official notice is taken of the record in the representation proceeding, Case 13-RC-14526, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 633 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D. C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Respondents response in part requests that the Board reconsider its decision in the underlying representation case. To the extent that Respondent's response may be considered a motion for reconsideration it is denied as not raising any issues not previously considered by the Board.

In its answer to the complaint and response ot the Notice to Show Cause, Respondent in substance contends that the certification is invalid for the reasons stated in its objections to the election and exceptions to the Hearing Officer's Report on Objections and Recommendations.

A review of the record in the representation proceeding, Case 13-RC-14526, discloses that an election directed by the Regional Director was held on January 26, 1978, and won by the Union. Respondent filed timely objections to conduct affecting the results of the election which, in substance, alleged that (1) the National Labor Relations Board agents conducting the election wrongfully denied Respondent's request to extend polling hours, (2) the Union's election observer unlawfully engaged in electioneering at the polls, (3) the Board agents improperly supervised the election, (4) agents of the Union interfered with the employees' free choice by acts of coercion and, by challenging voters on frivolous grounds, and (5) the Board unlawfully discouraged certain employees from filing unfair labor pracice charges.

The Regional Director issued his Supplemental Decision on March 16, 1978, overruling all of Respondent's objections except the one pertaining to the electioneering of the Union observer during the voting period and the failure of the Board agent to prevent it, and ordered a hearing on this objection. Respondent did not file exceptions. On May 5, 1978, the Hearing Officer issued her Report on Objections and Recommendations, in which she recommended that Respondent's objection be overruled, on the ground that the conversations of the union observer with employees were merely brief, innocuous exchanges and did not involve the appearance of electioneering, and the observer's performance of child care services was only a courtesy performed in response to a request. Respondent filed exceptions to the Hearing Officer's report. The Board, on September 29, 1978, in an unpublished decision, adopted the Hearing Offi-

cer's report and certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Midwest Stock Exchange, Incorporated, Midwest Clearing Corporation, Midwest Securities Trust Co., and Midwest Stock Exchange Corporation, are affiliated businesses with common owners, directors, control, location, and a common labor relations policy, and constitute a single employer and an integrated business enterprise engaged in

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[3] See *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

commerce within the meaning of Section 2(6) and 2(7) of the Act. Respondent has an office and place of business in Chicago, Illinois, where it provides facilities and services for individuals engaged in the business of purchasing and selling certain securities and options. During a representative 12-month period, Respondent, in the course and conduct of its business operations, serviced securities with shares having a combined value of over $500,000 which were purchased and sold at Respondent's facility, and serviced securities with shares having a combined par value of over $50,000 which originated outside the State of Illinois and were purchased and sold at Respondent's Illinois facility.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Office and Professional Employees International Union, Local 28, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees of the Employer at its facilities currently located at 120 South LaSalle Street and 640 North LaSalle Street, Chicago, Illinois, as specifically included in Appendix B attached hereto, but excluding those specifically excluded in said Appendix B, all professional employees, guards and supervisors as defined

in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. The certification

On January 26, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 13 designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 29, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and Respondent's Refusal*

Commencing on or about October 5, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 10, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since November 10, 1978, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described

in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (10th Cir. 1965).

The Board upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Midwest Stock Exchange, Incorporated, Midwest Clearing Corporation, Midwest Securities Trust Co., and Midwest Stock Exchange Service Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Office and Professional Employees International Union, Local 28, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees of the Employer at its facilities currently located at 120 South LaSalle Street and 640 North LaSalle Street, Chicago, Illinois, as specifically included in Appendix B attached hereto, but excluding those specifically excluded in said Appendix B, and all professional employees, guards and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 29, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 10, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Midwest Stock Exchange, Incorporated, Midwest Clearing Corporation, Midwest Securities Trust Co., and Midwest Stock Exchange Service Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees International Union, Local 28, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit as set forth in Appendix B attached hereto.*

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix A." Copies of said notice on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's repre-

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* [Ed. Note: Appendix B to this Decision and Order, which has not been reproduced herein, is identical to the unit description set forth at pp. 14-23 below.]

sentative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. April 24, 1979.

.....
John H. Fanning, Chairman

.....
Howard Jenkins, Jr., Member

.....
John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

FJP

Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 13-RC-14526

MIDWEST STOCK EXCHANGE, INCORPORATED,
MIDWEST CLEARING CORPORATION,
MIDWEST SECURITIES TRUST CO., and
MIDWEST STOCK EXCHANGE SERVICE INCORPORATED,
Employer,

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
LOCAL 28, AFL-CIO,
Petitioner.

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objection to an election held January 26, 1978,[1] and the Hearing Officer's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the Hearing Officer's findings and recommendation.

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 182 for and 149 against, the Petitioner; there were 28 challenged ballots, the resolution of which by stipulation of the parties was approved by the Regional Director. The Employer filed 5 objections to conduct affecting the results of the election. The Regional Director issued a Supplemental Decision on Objections overruling objections 1, 3, 4, and 5 and ordering a hearing on objection 2. No exceptions were filed to the overruling of objections 1, 3, 4 and 5.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Office and Professional Employees International Union Local 28, AFL-CIO and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All employees of the Employer at its facilities currently located at 120 South LaSalle Street and 640 North LaSalle Street, Chicago, Illinois as specifically included below, but excluding those specifically excluded below, all professional employees, guards and supervisors as defined in the Act as amended.

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John H. Fanning, Chairman

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Howard Jenkins, Jr., Member

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John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Thirteenth Region

Case No. 13-RC-14526

MIDWEST STOCK EXCHANGE, INCORPORATED,
MIDWEST CLEARING CORPORATION,
MIDWEST SECURITIES TRUST CO., and
MIDWEST STOCK EXCHANGE SERVICE CORPORATION
Employer

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
LOCAL 28, AFL-CIO
Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON AN OBJECTION TO CONDUCT AFFECTING THE RESULTS OF ELECTION

Pursuant to a petition filed on September 12, 1977 and a Decision and Direction of Election issued on December 15, 1977, an election by secret ballot was conducted under the direction and supervision of the Regional Director on January 26, 1978.[1]

The results of the election, as set forth in the amended tally of ballots issued on February 24, showed that of approximately 386 eligible voters, 182 cast ballots for and 149 cast ballots against Petitioner. There were 28 challenged ballots, the resolution of which by stipulation of the parties was approved by the Regional Director.

Thereafter, on February 2, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was duly served on the Petitioner.

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[1] Hereafter, all dates refer to 1978.

Following an investigation of the issues raised by the objections, the Regional Director, on March 16, issued a Supplemental Decision on Objections, overruling objections Nos. 1, 3, 4 and 5, and ordering that a hearing be held to resolve the issues raised by objection No. 2.

Pursuant to the notice of hearing served on the parties, a hearing was conducted April 4 and 5 in Chicago, Illinois. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded to all parties. Both parties submitted briefs, which have been duly considered.

The findings of fact and credibility resolutions contained herein are based upon my consideration of the entire record and upon my observations of the testimony and demeanor of the witnesses. Accordingly, any failure to completely detail all conflicts in evidence does not mean that such conflicting evidence was not considered.[2]

Objection No. 2:[3]

> A Union pollwatcher unlawfully engaged in electioneering while the polls were open in the corridor immediately outside the polling area and along the line of march to the polling place.

Evidence:

The Employer's objections concern only one of the polling places. This site was located on the twelfth floor of a building which housed eligible voting departments on various floors.

The voting booths and check-off table were located in a small room staffed by several Board Agents as well as two

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[2] *Bishop and Malco, Inc. d/b/a Walkers*, 159 NLRB 1159.

[3] Following the specific objection, the Employer included two pages of supporting text, which can be found in the Board's Exhibit 1(a).

observers for each party. Prospective voters waited in lines stretching down the narrow corridor outside of the voting room. The corridor was policed by one or more Board Agents, and a third observer for each party was also stationed in the corridor. Chairs for use by the observers were placed along the corridor facing the line.

Although there is no evidence that a specific polling area with "no electioneering" limits was delineated, no Board Agents or observers were stationed in areas away from the voting room or corridor.

Apparently, about half of the total eligible employees voted at this site, most of them (a Board Agent estimated 175) voting during the first half of the 4-hour voting period. Although witnesses testified that there were times when there was no line of voters, for the most part, the line consisted of from 5 to 20 voters.

All of the alleged objectionable incidents concern the conduct of Petitioner's observer Jonathan James, who was stationed in the corridor with the line of voters. Testimony on incidents allegedly happening in this corridor was supplied through the Employer's observer stationed in the hallway, Sonja Griffin, as well as through other unit employees, and through Board Agents assigned to the election. To support its objection regarding alleged incidents "along the line of march to the polling place" the Employer presented the testimony of Personnel Manager Ray Vaitenas, who was stationed during the election in the building's first floor lobby, where the incidents were supposed to have occurred. James testified on all alleged incidents.

All of the witnesses gave the appearance of testifying in honest reflection of their memories, Sonja Griffin and voter Lynn Douglas impressing me as particularly careful witnesses. Nevertheless, the record offers many contradictions and inconsistencies, arising especially when comparing the testimony of James with that of the other witnesses.

After a close review of James' testimony and demeanor, I cannot conclude that he deliberately altered his testimony to further the Petitioner's position. In fact, there is one instance where he candidly related an entire conversation, revealing facts detrimental to the Petitiner's case beyond those already presented by the Employer (Tr. 257). Rather, it appears that James was merely not as careful or cautious as the others in his attempt to present the facts in his memory. This resulted in much confusion and many inconsistencies in his own testimony. For example, James initially testified to a vague or absent recollection of the circumstances surrounding Douglas' voting. In later testimony, his recollection suddenly cleared, and he recalled precisely how many voters stood in line with Douglas (Tr. 275, 293, 295 and 318). In trying to place an exact time on a certain discussion, James alternated several times between confusion and definitude (Tr. 260-261 and 292). Steady questioning prompted a change in his recollection of how many voters with whom he shook hands (Tr. 274 and 304). Under cross-examination, James rendered two precisely opposite versions of his recollected interpretation of instructions from a Board Agent (Tr. 284 and 286). Similarly, he contradicted his own prior testimony in describing the content of a Board Agent's statement to him about a "closed election" (Tr. 271 and 282). Additionally, and significant to the issues of this case, James admitted an absence of recollection of events that "could have" occurred between himself and voters during the election (Tr. 290-91, 302 and 312).

On the basis of the foregoing, I choose to discredit the testimony of James in areas where any contradicting testimony exists. Therefore, I conclude that the following incidents occurred during the election in question.

Although Board Agents stationed in the corridor outside the voting room repeatedly informed voters that the observers were not allowed to speak with them, continually

throughout the election both Griffin and James were greeted and spoken to by voters waiting in line. Both returned greetings and briefly answered questions about their presence at the polling area. Having been warned at the preelection conference to "keep the conversation to a minimum," however, James and Griffin discouraged further conversation with voters, diverting them verbally and with gestures.

Griffin apparently had more success in the endeavor, as the evidence shows that she had only one conversation in the polling area that progressed beyond mere greetings. She was approached by her roommate (not in the area as a voter) who wanted to discuss temporary lodgings because of the snow emergency. Griffin continued and concluded the conversation only after having obtained the permission of the Board Agent to do so.

Contrastingly, James became involved in several exchanges with voters which progressed beyond mere greetings. Indeed, Jams even initiated some of the conversations. His activity was noticed by Board Agent Walter Hoffman, who cautioned James more than once to "cut his conversation short." Hoffman estimated that on perhaps six occasions he had to remind James that he could not be beyond greetings with voters. However, not every one of these warnings was prompted by James' actually having overstepped the bounds. In response to one caution from Hoffman to restrict conversation, James told Hoffman that he did not think he could do as requested, since it would be impolite not to speak to his friends. There is no evidence suggesting that the subject of the election, the Union, or the Employer's position was discussed during any of these conversations between James and voters in line.

The first conversation occurred about ½ hour after the polls opened. Both James and Griffin were seated facing the voting line, which consisted of at least five and perhaps twenty persons. A voter in line, Jerri Thomas, greeted

James with "What's happening?" He replied, "Nothing." Thomas thereafter asked him what he was doing there, and he explained that he was an observer. He then asked her what she had done the previous night, and inquired why she had her little girl with her. (Due to school closings, Thomas' 4-year old daughter accompanied her mother to work that day.) Thomas replied that she would be taking her child home and probably returning to work later. Thomas then asked James whether he would watch the girl while she went in to vote. James said "Yes," and Thomas commented that she would be right back. Griffin estimated that the entire conversation lasted 5 minutes. During this time, Thomas also conversed with other voters, and James was greeted by an unidentified voter.

Until her mother returned from the voting room, the child then stayed with James, sitting on his lap for awhile. The two of them chatted and played with a toy bank containing a few cents. Voters remarked on the child, although not directly to James. When Thomas returned, she took her daughter, telling James, "I'll see you later. Thank you." James responded, "Goodbye. Are you going home?" Thomas answered "Yes," and nothing further was said between them. Although a Board Agent was present in the corridor during these events, he did not become involved in any way.

The next incident occurred at around 1 p.m., an hour into the voting time. James and Griffin were seated, facing a line of about 15 voters. A young man (identified only as a work-study employee) joined the voting line, greeted James, and then began talking to James about work. The exact subject of his comments is not known. The young man talked with two or three other voters as well, and then began laughing and cracking jokes with James and other voters. James testified that the man was asking him about Griffin, commenting favorably on her looks, and that the other voters joined in and teased the young man as well.

There is no other evidence revealing the subject of the joking. During this time, the young man also asked James what he was doing there, and James responded that he was an observer. After 3 to 5 minutes, the incident ended with the intrusion of the Board Agent, who came over to ask James to "cut his conversations short" and to tell the voters to keep the corridor quiet. Thereafter, the voters just talked among themselves, and James was not further involved.

Sometime during the next 45 minutes, three voters, identified as Wendell, George and Tom Prentiss, came to the polling area. Upon their arrival, they greeted James, who was seated, and each shook hands with James. One said he was up there to vote, and James pointed to the line. They then joined the line and proceeded without further incident to the voting room. When they finished voting, they waited directly outside of the polling room. Board Agent Hoffman told them they could not loiter, and they moved on, walking past the two observers to the water fountain a few feet beyond. There they stopped. James got up and walked to the water fountain. He talked with the three men for a "minute or less" when Hoffman interrupted, telling the voters they could not loiter, and reminding James to cut his conversations short. The line consisted of about 10 to 15 voters throughout this incident.

At around this same time, another incident occurred involving a group of employees. Voter Lynn Douglas observed a "loud, noisy group" of 7 or 8 predominantly female employees get into line behind her. The unidentified voters commented on the decor and the pictures on the wall. James, who had been standing against the opposite wall, near his chair, walked across the corridor. James leaned over and whispered to a female member of the group, saying "more than one or two words but it was not an extended" discussion. Douglas does not recall a reply by any voter, nor did she hear the subject of the whispering.

James then stepped back to his former position. There were 4 or 5 other voters in line ahead of Douglas. There is no indication that a Board Agent became involved in the incident.

In another incident, a female voter, after having voted, walked past James' chair as she left the polling area. As she did so, he patted her on the posterior and said, "Hello." She asked, "What are you doing up here?," and he replied that he was an observer. Nothing further was said. There were about ten persons in the voting line at the time.

Sometime during the first 2 hours of the polling period, James asked Hoffman whether observers could take a lunch break. Hoffman replied that it was allowed. At approximately 2 p.m., James left the polling area without Hoffman's knowledge. He took the elevator to the first floor lobby, and then took the stairway to the basement, which houses several unit departments as well as employee lockerrooms and rest rooms. James went to the lockerroom to get his coat and other belongings. While in the men's room he removed his observer badge and put it in his pocket. James had not been instructed to leave his badge at the polling place. He did not display his badge again until his return to the twelfth floor.

James then left the building for a nearby bank and, upon his return, purchased a lunch at a concession in the first floor lobby. He talked to a group of about three unit employees in the lobby, putting his arm around a female employee. It is not known what was discussed, but the conversation lasted about 3 minutes. Thereafter, all of them left the lobby, using the elevators.

The incident, witnessed by Personnel Manager Vaitenas, was reported to the Employer's attorney, who then related it to the agents conducting the election. Shortly after James' return to the polling area, he was spoken to by

Board Agent Carl Tominberg about the incident. Tominberg told James he had heard complaints about James' talking to voters. He asked James not to have any conversation with voters. When James responded that he did not know if he could do that, Tominberg instructed him to do his best. Apparently, the election proceeded to its conclusion without further incident.

Analysis:

In *Milchem, Inc.*, 170 NLRB 362, the Board prohibited sustained and prolonged conversation between agents of parties to the election and voters waiting to cast their ballots. Such activity, regardless of the content of the convention, was found to be a basis for setting aside an election. Intending the proscription to be "a preventive device to enforce the ban against electioneering," the Board hoped that it would not only eliminate the possibility for the gaining of a last-minute advantage by either party, but that it would also protect the voter from distraction and intrusions upon his thoughts as he made an important decision.

Nevertheless, at the same time that the Board announced its prohibition of conversation between agents and voters in the polling area, it limited somewhat the strictness of that standard. Not every "chance, isolated, or innocuous comment or inquiry" by an agent would be sufficient to trigger a finding of objectionable conduct. The conclusion in a subsequent case, *Century City Hospital*, 219 NLRB 52, has borne out the Board's stated intention not to become concerned with trifles on this issue.

Even though James spoke to voters in the corridor to an extent beyond a mere exchange of greetings, the mild nature of his activity holds it outside the bounds of the *Milchem* proscription. I conclude that it is not sufficient to warrant setting aside the election.

James did not engage in prolonged or sustained conversations with any voters in the polling area. Of the five in-

cidents presented, three amounted to brief exchanges between James and voters lasting a minute or less. These include his communication with the small group of voters behind Douglas, his visiting with three friends at the water fountain, and the incident involving his patting a female voter on the posterior. Two of these incidents involved employees who had already voted.

Likewise, the two lengthier conversations do not appear to be of the type banned by *Milchem* in order to protect voters and to prevent one party's gaining a last-minute advantage. James' conversation with Jerri Thomas was an exchange of pleasantries initiated by the voter when, upon her arrival, she did not see any other familiar faces. James' conversation with the work-study employee amounts to friendly banter, also initiated by the voter. Neither incident involved a one-to-one conversation: other voters took part at will. Moreover, neither set of circumstances even suggests the appearance of electioneering, the basis for the *Milchem* proscription of conversation.

The Employer alleges James' performance of child care services for Thomas to be objectionable conduct. The problem of observers offering or performing favors for voters was raised in *Modern Hard Chrome Service Co.*, 187 NLRB 82, where an election was set aside because an observer offered a voter money to buy himself a beer. In the instant case, James did not gratuitously offer his services to a voter, but rather agreed to perform the courtesy in response to the voter's request. Moreover, not every offer of a favor by an observer to a voter during the election has been found to be improper conduct. *William Pastoor and Ray Pastoor, a Co-Partnership d/b/a a Pastoor Bros. Company*, 223 NLRB 451, 453. I, therefore, conclude that James' performance of child care services for a voter during the election is not objectionable conduct.

James' activities in the first floor lobby, including conversations with voters, must also be considered. As an

observer, he was still an agent of the Petitioner at the time, although not outwardly identified as such. However, the site of these activities are beyond the *Milchem* restriction. The lobby is clearly outside of the polling area, and the employees were not waiting in line to vote. *Locust Industries, Inc.*, 218 NLRB 717. Even assuming that the employees with whom James talked in the lobby were on their way to the voting area, *Milchem* would not prohibit James' activities. In *Sterling Faucet Company, Texas Division, a Subsidiary of Rockwell Manufacturing Company*, 203 NLRB 1031, 1037, the Board held that union agents were allowed to electioneer "on the main aisle of the plant which employees would normally follow . . . to the polling place" without transgressing the *Milchem* rule. I, therefore, conclude that James' conduct in the lobby does not warrant setting aside the election in the instant case.

In its brief, the Employer claims that its objection No. 2 and the evidence brought forth in the hearing raise an allegation that Board Agent misconduct warrants setting aside the election. The text included with the original objection No. 2 alleges that:

> The Board's failure to properly insure that such electioneering (by James) would not occur also gives cause for a new election. Mr. James' conduct and the slack monitoring of hallway electioneering created an atmosphere around the polling area of strong union sympathy . . . .

As I have concluded that the underlying allegation of objectionable electioneering is without merit, I cannot but conclude that the Board Agents' alleged failure to control James' activities does not amount to misconduct warranting the setting aside of the election. Moreover, the evidence shows that the Board Agents made repeated attempts to curb James' questionable activities, with eventual success.

CONCLUSIONS AND RECOMMENDATIONS[4]

Based upon the findings of fact and credibility made herein and the principles of law discussed above, I recommend that the Employer's objection No. 2 be overruled. I further recommend that a Certification of Representative issue.

Dated at Milwaukee, Wisconsin this 5th day of May 1978.

/s/ Lois Benes Voelz
Louis Benes Voelz, Hearing Officer
National Labor Relations Board
Thirtieth Region
Suite 230, Commerce Building
744 North Fourth Street
Milwaukee, Wisconsin 53203

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[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to the report must be received by the Board in Washington, D. C. by May 18, 1978. Immediately upon the filing of exceptions, the party filing same shall serve a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the Hearing Officer.

Sec. 9 of the Labor Management Relations Act, 29 U.S.C. § 159—

Sec. 9.

(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board.

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of

the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations.

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of repre-

sentation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript.

Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 10, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections.

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organizations and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.